



**Itira v Riley Services Limited (Cause 348 of 2017)
[2023] KEELRC 428 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 428 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 348 OF 2017
JK GAKERI, J
FEBRUARY 20, 2023**

BETWEEN

ANTONY ITIRA CLAIMANT

AND

RILEY SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on 2nd February, 2017 alleging unfair/unlawful summary dismissal from employment and non-payment of terminal dues and compensatory damages.
2. The Claimant alleges that he was employed by the Respondent in September 2010 as a Security guard at Kshs.7,500/= per month.
3. The Claimant avers that in September, 2015, he and other employees stationed at the University of Nairobi were notified that the University had terminated the contract with the Respondent and was advised to be reporting at the Respondent's offices daily for redeployment and was subjected to further training for 2 months without pay and was later called to surrender his uniform but waited for 3 months for payment of salary.
4. It is the Claimant's case that he received a letter of summary dismissal on 18th June, 2016 dated 8th October, 2015.
5. The Claimant faults the Respondent on the grounds that he had not done anything to warrant dismissal, no notice to show cause was issued and was not heard.
6. The Claimant prays for;



- i. A declaration that the Respondent's termination/dismissal of the Claimant's employment was illegal, unlawful, unfair and inhumane and that the Claimant is entitled to terminal benefits and damages.
- ii. An order for the Respondent to pay the Claimant terminal dues and compensatory damages of Kshs.503,238.00.
- iii. Costs of this claim with interest.

Respondent's case

7. In its Statement of Response filed on 13th October, 2017, the Respondent avers that the Claimant was its former employee. That in September 2015, one of its clients terminated its contract and the guards at the institution were requested to report to the office for re-deployment but the Claimant did not and absconded duty from 1st October, 2015 and was unreachable and a summary dismissal letter was dispatched after one week. He did not respond but reported on 20th November, 2015 and returned some of the items he had and indicated that he was no longer willing to work for the Respondent.
8. That he was informed to collect his dues but did not until July 2016 when he sent an appeal against the summary dismissal more than 7 months later and the appeal was rejected.
9. The Respondent avers that the Claimant's terminal dues were ready for his collection.
10. The Respondent denies that the Claimant was dismissed without cause. That he absconded duty, was not underpaid and did not appeal the dismissal within the prescribed duration.
11. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

12. The Claimant denied having absconded duty and alleged that his employment was terminated on 18th June, 2016 and appealed the decision and received a response. That he signed the Staff Exit Form on 1st October, 2015 and his net pay was Kshs.7,800/=.
13. On cross-examination, the Claimant testified that he was employed in 2010 but had no evidence to prove so. The witness confirmed that he signed the Employment Contract dated 26th December, 2014 and provided the necessary details of his place of birth, wife and children and postal address which he confirmed was his only address.
14. The witness confirmed having applied for employment in 2015 together with a reference from the Chief and that he received the termination letter and appealed against the dismissal. He admitted having signed the warning orders dated 5th March, 2015 and 22nd April, 2015 and the disciplinary sheet dated 23rd April, 2015, denied having been sleeping or drunk at work but admitted writing an apology letter dated 2nd May, 2015.
15. The witness admitted that the payslip on record was his net pay in September 2015 was Kshs.13,289.95.
16. On re-examination, the witness testified that he was employed in 2010 and was based at the Kenya Power and Lighting Co. Ltd and applied for employment by the Respondent in 2015.
17. That he was dismissed because the contract between the University of Nairobi and the Respondent lapsed.



Respondent's evidence

18. RWI, Nancy Machage testified that the Claimant was employed by the Respondent under a fixed term contract and the Claimant absconded duty from 1st October, 2015 and attempts to reach him through his mobile number fell through. It was her testimony that she neither knew nor dealt with the Claimant.
19. RWII, Mr. Hassan Shaban testified that he was a colleague of the Claimant at the University of Nairobi and after the contract lapsed, he was re-deployed to Kenya Breweries and later at Development House. That the Claimant did not report back for redeployment.

Claimant's submissions

20. The Claimant's counsel addressed two issues, namely; whether the Claimant's employment was terminated or he deserted duty and whether he was entitled to notice pay.
21. On the first issue, it was submitted that the Claimant was directed to be reporting to the office and did so for 2 months without salary or transport and was later called to surrender the uniform followed by a termination letter in June 2016. It was urged that the Respondent posted a letter instead of calling the Claimant's number xxxx which the Respondent had. That the Respondent led no evidence that the letter was indeed posted. That the Claimant was not accorded a hearing in November 2015 when he reported back.
22. The decision in *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* (2015) eKLR was relied upon to underscore the obligation of the employer in cases in which desertion was relied upon as a defence. It was submitted that the Respondent failed to prove desertion.
23. It was urged that the Claimant's employment was terminated unfairly and it was the Respondent's duty to prove that there was a valid reason for termination and a fair procedure was employed.
24. Counsel urged that the Claimant was entitled to maximum compensation at Kshs.13,288.95, the sum of Kshs.159,467.40 for the unceremonious termination of employment.
25. As regards entitlement to pay in lieu of notice, it was submitted that his employment was terminated abruptly on an unspecified date as there was no notice of termination.

Respondent's submissions

26. The Respondent's counsel addressed three issues, namely; when was the Claimant employed by the Respondent, was the Claimant's employment unlawfully terminated and the reliefs sought.
27. As to when the Claimant was employed by the Respondent, reliance was made on the Employment Contract on record dated December 2014.
28. The Respondent submitted that the Claimant's averment of having been employed in 2010 was unsubstantiated as neither a written document nor bank statement as salary was allegedly paid through the bank. It was urged that the Claimant had not proved that he was employed before December 2014 and applied for employment in January 2015.
29. As regards termination of employment, it was submitted that the Claimant absconded duty as confirmed by RWI and the attendance register on record.
30. That he failed to turn up for redeployment as confirmed by RWII.



31. It was further submitted that the Claimant adduced no cogent evidence to show that the Respondent failed to re-assign him.
32. Counsel submitted that attempts by the Respondent to contact the Claimant through his wife failed and a decision was made to terminate his employment and was accorded an opportunity to appeal. The decision in *Peter Oluoch Deya v Riley Services Ltd* (2019) eKLR was relied upon to reinforce the submission.
33. It was further submitted that the Claimant had incidences of misconduct at the work place but was not dismissed on such ground. It was urged that termination of the Claimant's employment was not unfair.
34. As regards the reliefs sought, it was submitted that pay in lieu of notice was unmerited since the Claimant absconded duty. That the prayer for 5 years terminal dues was unclear and thus not well pleaded or articulated as was the prayer for underpayment and the minimum wage for a day guard was Kshs.10,954.70 and a housing allowance of Kshs.1,643.20 making a total of Kshs.12,597.70 in 2015. It was urged that even if the Claimant was a night guard, there was no underpayment and the claim had no basis.
35. On loss of employment, it was submitted that the prayer was not a recognized head of claim and was thus unclear and should be rejected.
36. That the Claimant had not prayed for compensation and there was no basis for its award.

Determination

37. Having considered the pleadings, evidence and submissions by counsel and authorities cited, the issues for determination are;
 - i. When the Claimant was employed by the Respondent.
 - ii. Whether the Claimant's employment was unfairly terminated or he absconded duty.
 - iii. Whether the Claimant is entitled to the reliefs sought.
38. As to the date or year of employment, parties have adopted different timings. While the Claimant testified that he was employed in 2010, the Respondent averred and testified that the Claimant was employed under a fixed term contract dated 26th December, 2014 and effective from even date to 25th December, 2015. The Respondent provided a copy of the agreement which the Claimant signed on 26th December, 2014. In addition, the Claimant confirmed that the document was the Employment Contract and admitted having signed it.
39. Surprisingly, although the contract had a provision for salary or wage, no amount had been indicated. In his evidence, the Claimant asserted that he was employed in September, 2010 but had no documentation on the employment or circumstantial evidence such as bank statement, payslip or other evidence to establish the relationship before December 2014 and confirmed as much.
40. He admitted that he was vetted by the Respondent before he was employed in 2014. He admitted having applied for employment in early 2015.
41. Why would the Respondent request for the documents in Clause I of the Employment Contract, if the Claimant had been in its employment since September, 2010?



42. From the evidence on record and the claims admission, the court is satisfied that the Claimant was employed on 24th December, 2014 under a fixed term contract.
43. As to whether the Claimant's employment was unfairly terminated or he deserted the work place, parties have adopted opposing arguments. While the Claimant urges that his employment was unfairly terminated, the Respondent maintains that the Claimant absconded duty from 1st October, 2015.
44. According to Black's Law Dictionary (10th Edition), desertion is defined as;
- “The wilful and unjustified abandonment of a person's duties or obligations.”
45. The concept of desertion was also explained by the Court in the often cited South African decision in *Seabolo v Belgravia Hotel*(1997) 6 BLLR 829 (CCMA).
46. The essence of desertion is the decision by the employee not to return to the work place.
47. According to the Claimant, when the contract between the University of Nairobi and the Respondent lapsed on 30th September, 2015, they were told to report to the office for redeployment and he did so for 2 months without a salary or transport allowance until he received the termination letter. The Claimant's evidence that he reported to the Respondent's office for 2 months seeking redeployment was far from truthful. Why would the Respondent post a letter to his address in Kisii if he used to report to the office. More significantly, when did the two (2) months period commence?
48. Instructively, the Claimant signed the Staff Exit Clearance Form for the shirt, trouser, belt, sweater and cap on 1st October, 2015 which signified that he cleared with the Respondent although the form does not contain any computations.
49. According to the Respondent, the Claimant deserted duty effective 1st October, 2015 and the summary dismissal letter was issued a week later. Although the Respondent's witness testified that attempts to reach the Claimant on his cell phone or through the wife's number fell through, he provided no evidence of the numbers involved or who made the calls and when.
50. From the documents availed by the Respondent, it is clear that the Claimant stopped reporting to the work place sometime between September and October 2015.
51. In addressing this issue, the court is guided by the sentiments of Onyango J. in *Judith Atieno Owuor v Sameer Agriculture & Livestock Ltd* (2020) eKLR as follows;
- “Further, even if she absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court it did accord the claimant a fair hearing prior to termination.”
52. As courts have held where an employer relies on the defence of desertion or absconding of duty, it must prove the efforts made in its endeavour to contact the employee and have the employee resume duty or explain the circumstances they were in.
53. The sentiments of the court in *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR are worth citing;
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At



the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

54. The Respondent availed no documentary evidence to demonstrate the efforts expended to reach out to the Claimant to appreciate why he was not reporting to work. It adduced no evidence as to who called the Claimant or his wife and when.
55. Relatedly, the Respondent issued a summary dismissal letter instead of issuing a notice to show cause first for the Claimant to explain the alleged desertion.
56. Needless to emphasize, Section 45(2) of the *Employment Act* provides inter alia that the employer must prove that it had a valid and fair reason to terminate the employment and did so in accordance with fair procedure.
57. As held in legions of decisions of this court and the Court of Appeal for a termination of employment to pass muster, it must be procedurally fair and substantively justified as explained by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
58. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis v Oxford University Press (E.A) Ltd* (2017) eKLR.
59. As held in Judith Atieno Owuor’s case (Supra), in the instant case, it is the finding of the court that the Respondent adduced neither evidence of desertion of duty nor a fair termination of employment as ordained by the provisions of the *Employment Act*, 2007. The fact that the Claimant was informed of the right of appeal did not imbue fairness in the process to the standard prescribed by the law under Section 41 of the *Employment Act*. Termination of the Claimant’s employment did not pass the fairness test and it is the finding of the court that it was unfair.
60. As regards the reliefs sought, the court proceeds as follows;
 - i. Having found that termination of the Claimant’s employment was unfair for want of procedural propriety, a declaration to that effect is merited.
 - ii. One month’s salary in lieu of notice
61. Evidence on record shows that the Claimant absented himself from work without authority for about one week before the summary dismissal letter was posted to him. The court is satisfied that the Respondent had a justifiable reason to terminate his services.

The prayer for pay in lieu of notice is unmerited and is disallowed.

iii. Terminal dues for 5 years

62. As correctly submitted by the Respondent, this prayer was neither particularised nor proved by the Claimant. It is unclear as to what it encompasses and why for 5 years yet the Claimant worked for less than 2 years.

In the absence of the requisite particular, the prayer is disallowed.

iv. Underpayment

63. Intriguingly, the Claimant could not establish his monthly pay as he had neither a payslip nor bank statement and the employment contract on record had not indicated the amount payable.



64. In his evidence-in-chief, the Claimant stated that his net salary was Kshs.7,800/= but did not indicate whether this was the starting salary or what he was earning when his services were terminated. The Memorandum of Claim had a figure of Kshs.7,500/=.
65. However, on cross-examination, the Claimant admitted that a copy of the payslip on record for September 2015 was his net salary was as particularised therein, Kshs.13,289.95.
66. Noteworthy, the Claimant adduced no evidence to show that he was working as a night guard to apply the sum of Kshs.12,221.00 which was effective from 1st May, 2015. But on the other hand, the Respondent did not controvert the assertion. A house allowance of 15% would be Kshs.1,833.17 and the gross salary would have been Kshs.14,054.27 less than the gross pay he was earning of Kshs.14,799.20.
67. The Claimant has not demonstrated any underpayment from 1st May, 2015 to September, 2015.
68. Under the Regulation of Wages (General) Order, 2013 effective 1st May, 2013 to 30th April, 2015, the minimum wage of a night guard was Kshs.10,911.70. A house allowance of 15% would be Kshs.1,636.76, a gross salary of Kshs.12,548.40 less than the sum of Kshs.14,799.20 the Claimant was earning.
69. In sum, it is the finding of the court that the Claimant has on a balance of probabilities failed to demonstrate that he was underpaid.

The claim is disallowed.

v. Loss of employment

70. Having found that Claimant's services were unfairly terminated by the Respondent, the Claimant is entitled to compensation under Section 49(1)(c) of the [Employment Act](#).
71. Having pleaded and proved that termination of his employment was unfair, it would be unfair and indeed unjust if the Claimant was disentitled the relief due to him on account of misdescription of the relief.
72. In addition, the amount computed under loss of employment is the 12 months compensation.
73. In compliance with the provisions of Section 49(4) of the [Employment Act](#), the court has considered the following;
 - i. The Claimant was an employee of the Respondent from 26th December, 2014 to 8th October, 2015, a duration of about 9 months and 12 days, a fairly short period.
 - ii. The Claimant did not demonstrate whether he wished to continue in the Respondent's employment.
 - iii. In less than one (1) year, the Claimant had two warning orders dated 5th March, 2015 and 22nd April, 2015 respectively for being asleep while on duty and being under the influence of alcohol and was surcharged in both cases total of Kshs.1,100/= as well as refresher for 3 hours for 4 days and a change in shift suggested and was subjected to disciplinary proceedings and suspension was recommended.

The Claimant apologised by letter dated 2nd May, 2015.
 - iv. The Claimant substantially contributed to the termination of his services by the Respondent by his absence from the work place.



74. In the circumstances, the court is satisfied that the equivalent of two (2) month's is fair, Kshs.29,598.40.
75. In the end, judgement is entered for the Claimant against the Respondent as follows;
- a. A declaration that termination of the Claimant's employment was unfair.
 - b. Equivalent of two (2) month's salary.
 - c. Costs of this suit.
 - d. Interest at court rates from the date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

